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No. 88-1905

In the Supreme Court
OF THE
United States

OCTOBER TERM 1988

EDDIE KELLER, ET AL

v.

STATE BAR OF CALIFORNIA, ET AL

On Petition For Writ of Certiorari
To The Supreme Court of California

RESPONDENTS' BRIEF ON THE MERITS

ISSUES PRESENTED

The questions certified for review, as framed by the Petitioners, require a resolution of the following central issues:

1. Whether a state may constitutionally establish a state bar as a state agency for the purposes of both regulating the profession and improving the administration of justice; and, if so,

2. Whether activities of the State Bar of California, authorized by state law to promote those purposes, including lobbying, amicus briefs, and membership conferences, may be funded with compelled fees?

The first of these questions was answered affirmatively by this Court in *Lathrop v. Donohue*. The answer to the second, as shown below, is also affirmative.

STATEMENT OF FACTS

A. Procedural History

This action was filed by 21 past and present members of the State Bar of California,[1] seeking to enjoin a broad range of activities by the State Bar that they oppose. According to petitioners, the use of the fees they are statutorily required to pay to the State Bar violates their First Amendment rights. Petitioners seek to enjoin the State Bar from proceeding with all activities outside of the area of admissions, discipline, and regulation of practice.

Petitioners challenged generally all activities engaged in by the State Bar pursuant to its charge under California Business & Professions Code (hereinafter "Bus. & Prof. Code") § 6031(a), to promote "the improvement of the administration of justice." They included in their pleadings below a partial list of specific matters, which, they contended, show these activities were objectionable. Petitioners challenged all "lobbying [of] the California State Legislature on various matters," "submitting of briefs amicus curiae in various cases," and "financing meetings of the Conference of Delegates."[2] Joint Appendix at 4-5. They characterized all such activities of the State Bar as "political" or "ideological." *Id.*

Petitioners' motion for preliminary injunction was denied on March 4, 1983. (Joint Appendix 222-24) Following extensive discovery, respondents filed a motion for summary judgment; judgment was granted in favor of all defendants on May 24, 1984. (Joint Appendix 477-79) After Petitioners unsuccessfully sought a writ of mandate, they appealed to the California Court of Appeal. The Court of Appeal reversed the grant of summary judgment (Joint Appendix 480-536).

The California Supreme Court disagreed. It found that the State Bar, as a governmental entity, is entitled to use its revenues for any purpose properly within its statutory authority, subject to the limitations on government speech applicable to all state agencies in California to protect First Amendment rights. *See Stanson v. Mott*, 17 Cal. 3d 206, 130 Cal. Rptr. 697 (1976). Accordingly, the California Supreme Court reinstated the summary judgment as to all issues except the educational campaign on judicial retention, approving the State Bar's lobbying of the Legislature, filing of amicus briefs, and financing of meetings of the Conference of Delegates. (Joint Appendix 556-620)

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[1] Certain petitioners are not now active members of the State Bar. See Petitioners' Brief at 5 fn.2.

[2] Petitioners also challenged specifically the 1982 inaugural speech of the State Bar president and the circulation by the State Bar of a copy of the speech and other materials pertaining to California's November election to confirm six justices of the state's high court. In the opinion below, the California Supreme Court found that the speech and materials were prohibited campaign activities under state law because of the nature of parts of the materials and the timing of their release. *Keller v. State Bar of California*, 47 Cal. 3d 1152, 1173, 255 Cal. Rptr. 542 (1989). However, the Court found that the Board of Governors could reasonably believe that these activities were authorized by law and therefore was not personally liable for the related expenditures, as contended by petitioners. *Id.* at 1172-73. Petitioners do not seek review of that part of the opinion by this Court, acknowledging that the California Supreme Court resolved both claims on state law grounds. Pet'n for Writ of Cert. at 4 n.1; Opening Brief at 6 n.3.

B. The History of the State Bar and Its Activities

The State Bar was created as a public entity in 1927 and established by the voters as a constitutional agency in both 1960 and 1966. *See* article VI, § 9, California Constitution (establishing the State Bar of California as a public corporation). The parallel legislative enactment, establishing the State Bar as a public corporation and enumerating its powers, is the State Bar Act, Business & Professions Code §§ 6000, et seq. The creation of the State Bar in 1927 was in part prompted by concerns about inadequate professional standards and competence and by widespread recognition of the need for assistance in legal reform and improvement of judicial administration. All persons admitted and licensed to practice law in California except justices and judges of courts of record during their service in office are members of the State Bar. Bus. & Prof. Code § 6002.

The State Bar performs regulatory, adjudicative and informational functions. The State Bar regulates the admission to the practice of law. *See* Bus. & Prof. Code §§ 6046, 6060. Subject to Supreme Court oversight, it has the power to formulate rules of professional conduct, Bus. & Prof. Code § 6076.5, and to discipline members who breach them, Bus. & Prof. Code § 6077. In adjudicating disciplinary violations, the State Bar complies with due process requirements of notice and hearing. *In re Petersen*, 208 Cal. 42, 45, 280 P. 124 (1929). The State Bar also enforces rules against unlawful practice and illegal solicitation, provides an arbitration system for fee disputes, and maintains a client security fund. (Joint Appendix at 563)

The Legislature also has empowered the State Bar to carry on activities to improve the administration of justice and to advance the science of jurisprudence. Bus. &

Prof. Code § 6031(a). The State Bar's programs assist all branches of state government. For example, the State Bar appoints four members of the Judicial Council, and two members of the Commission on Judicial Performance. Cal. Const. art. VI, §§ 6, 8. It assists the Law Revision Commission, Gov't Code § 8287, and is required to evaluate the qualifications of the governor's judicial nominees. Gov't Code § 12011.5. (*See also* Joint Appendix at 564.) The State Bar also uses the expertise of California's attorneys to inform other governmental agencies and the public on law-related issues through activities such as lobbying and filing *amicus* briefs. Petitioners challenge these activities in a general manner, but, in fact, the lobbying and *amicus* activities of the State Bar are closely tied to issues concerning the legal system.[3]

A 23-person Board of Governors, consisting of a president elected by and from members of the Board, 15 members elected by lawyers from 9 geographical districts, 1 member from the California Young Lawyers Association and 6 members of the public appointed by the governor and officials of the legislature, administers the State Bar. Bus. & Prof. Code §§ 6012, 6013, 6013.4, 6013.5. Members of the Board of Governors are public officers, acting under oath. *Chronicle Publishing Co. v. Superior Court*, 54 Cal. 2d 548, 566, 7 Cal. Rptr. 109, 354 P.2d 637 (1960). Members of the Board and State Bar employees are also subject to state law relating to disclosure of financial

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[3]The specific activities identified in the complaint are not supported by the record and were denied by the State Bar (Joint Appendix at 37). The items for which lobbying was approved for 1982 (set forth at Joint Appendix 165-92) show the concentration of Bar activities in areas in which it has special expertise and professional obligations. *See, e.g., id.* at 175 (assigned counsel compensation and standards).

interests and conflicts of interest. *See* Gov't Code §§ 87100, et seq. State Bar employees are participants in the State Retirement Fund. Gov't Code §§ 20000, et seq.; 20009, 20009.1.

The State Bar is financed and regulated as a governmental agency. It funds its activities primarily through fees authorized by the Legislature, based on a report submitted by the State Bar of all its projected activities and anticipated funding needs.[4] *See* Decl. of M. Wailes and Ex. 2 to Defendants' Opposition to Motion for Preliminary Injunction, (Joint Appendix at 155-197; 75-125). All property of the State Bar is held for "essential public and governmental purposes in the judicial branch of government" and is tax exempt. Bus. & Prof. Code §§ 6008, 6008.2. Except for certain confidential proceedings, all meetings of the Board of Governors must be open to the public. Bus. & Prof. Code § 6026.5.

The State Bar began activities to address the public concerns that led to its formation immediately. Many of the programs begun by the State Bar in its early years have lasted in one form or another over the more than 60 years of its existence and were well in place when the voters gave the State Bar constitutional authorization. For example, even in the earliest years of the Bar, and

[4]The detailed information provided to the Legislature includes the State Bar's regular public disclosures of the nature and extent of its lobbying activities and expenses. For example, the State Bar quarterly files forms entitled "Report of Lobbyist Employer" with the Secretary of State, reporting, in detail, all of its lobbying activities, including the names of its lobbyists, the bills on which they communicated, and the expenses incurred. *See, e.g.*, Joint Appendix at 236-52. In addition, the State Bar's reports to the Legislature, submitted in connection with the fees bill, provide detailed descriptions of all its programs and activities. *See, e.g.*, Joint Appendix at 114-24, 126-54, 260-62.

throughout its history, it has sponsored programs to improve delivery of legal services to the poor, to promote reform in procedural and substantive areas of law, and to educate the public about issues affecting the State Bar.[5] From its inception, the Bar organized sections of members to study and propose legal reform in specific areas of law. It also facilitated meetings of its members to discuss current legal issues in an open forum, now the Conference of Delegates.[6] Nor is legislative activity new to the State Bar. One of the most effective ways in which the State Bar has fulfilled its obligations to advance the science of jurisprudence and to improve the administration of justice has been to suggest and promote legislation, and to provide assistance to the Legislature.

SUMMARY OF ARGUMENT

This case presents the Court with two starkly contrasting views of the legal profession. The first, as chosen by the people and Legislature of the State of California through constitutional and legislative enactments, envisions the legal profession as serving the public interest by aiding in the administration of justice and regulating the legal profession. The second, advanced by Petitioners in this lawsuit, envisions a group with far more limited

[5]A detailed discussion of the history of the State Bar and its activities is included in the Declaration of Magdalene Y. O'Rourke (Joint Appendix at 198-213).

[6]The list of topics presented at the 1982 Conference of Delegates (Joint Appendix at 369-382) and the results of the 1980 and 1981 resolutions (Joint Appendix at 382-409) show a vast disparity between Petitioners' descriptions and the reality. *See also* Declaration of Truitt A. Richey listing *amicus curiae* activity (Joint Appendix at 439-56).

obligations, bound together by the State for the sole purpose of admitting and disciplining lawyers.

Petitioners ask this Court to override California's policy decision to request the lawyers of California to undertake these tasks through an integrated bar that is part of State government. Seeking to substitute their own narrow view of lawyers' professional obligations for that chosen by the State, they ask this Court to limit the State Bar's activities to regulation of the admission and discipline of lawyers. In so doing, Petitioners request this Court to ignore the California Supreme Court's interpretation of the State Bar's purposes, as well as its ruling that the State Bar is a governmental entity whose activities are subject to established rules relating to government speech.

Petitioners are not free to characterize the State Bar to suit the purposes of their lawsuit. The improvement of the administration of justice is as central to the integration of the bar as is the regulation of lawyers. Indeed, California adopted the concept of the integrated bar to serve that goal, and to provide a mechanism for individual lawyers to discharge their professional responsibilities. Nearly thirty years ago, in *Lathrop v. Donohue,* this Court approved compulsory membership in an integrated bar that, like the State Bar of California, both regulated the profession and aided in the administration of justice.

The ruling below defines the scope of the State Bar's role in the administration of justice sufficiently to enable the State Bar to fulfill its mandated role in state government, while protecting First Amendment rights. Thus, the court below properly upheld the State Bar's authorization to communicate with the Legislature, file amicus briefs, and hold its annual meetings of the Conference of Delegates. The court specifically held that these activities

were authorized under state law, and did not violate the First Amendment. In their categorical challenge to the State Bar's activities, Petitioners have not claimed that these activities were not authorized; they limit their claims to the principles applied to labor unions, and not to governmental agencies. However, the challenged State Bar activities constitute actions by government, and are measured by the standards of government speech. Under those tests, the activities are appropriate.

The State Bar's activities add to the totality of speech in the public arena, while posing only the most minimal burdens on Petitioners, and no more than are borne by other taxpayers who disagree with governmental messages. The attenuated link between Petitioners, 21 of California's 122,000 lawyers, and the speech of the State Bar, is too weak to support their claimed negative rights of speech and association.

Petitioners ask this Court to reject the standard applicable to government speech and substitute instead the standard applicable to labor union activities. However, the vast differences between the State Bar's purposes and those of private economic organizations militate against application of the same standard to both. Moreover, the challenged activities are constitutional even if measured by the actual standards of the union cases. Germaneness is the measure of permissible union activities and the State Bar's activities in advising the Legislature of its position on various pending measures, filing of *amicus* briefs and holding of the Conference of Delegates clearly are germane to the administration of justice and the regulation of the profession. Petitioners' insistence that the union cases require the State Bar to prove that its activities further a compelling state interest finds no support in the cases that they cite.

Finally, the public interest in improving the legal system is compelling enough to justify the State Bar's activities even under the inapplicable strict scrutiny standard urged by Petitioners. Petitioners have identified no less restrictive means for the State Bar to achieve its goal, and given the nature of the State Bar's functions, no such means exist. To impose limitations on the State Bar's activities beyond those imposed by the decision below would severely hamper the State Bar's ability to fulfill its many mandated and permissible functions.

The State Bar urges this Court not to deprive the states of their ability to choose the appropriate means to develop their legal systems, or to deprive California of the important contributions the State Bar makes to its governance. Ironically, Petitioners here seek to prevent the State Bar from continuing its very constructive role by silencing it, claiming that the First Amendment should prevent such speech. In affirming the decision below, this Court will avoid silencing the State Bar of California, and reaffirm the right of the states to ensure that their bars continue to serve the interests of the public in the highest professional tradition.

ARGUMENT

I.

THE CHALLENGED STATE BAR ACTIVITIES DO NOT VIOLATE THE FIRST AMENDMENT RIGHTS OF DISSENTERS

A. The State Bar Of California Is Part of the Democratic Structure Of Government

The State Bar of California serves essential public purposes that have been recognized by numerous decisions of the California Supreme Court. *See, e.g., Herron v.*

The State Bar, 212 Cal. 196, 199, 298 P. 474 (1931); *State Bar of California v. Superior Court*, 207 Cal. 323, 330-31, 278 p. 432 (1929). This Court approved mandatory membership to serve similar interests in *Lathrop v. Donohue*, 367 U.S. 820, 6 L.Ed.2d 1191, 81 S.Ct. 1826 (1961). California's statutory scheme outlined above carefully defines these functions; it is refined through regular oversight of the Bar's activities by the democratically-elected legislature. The authorization is both detailed and explicit,[7] and is enforced through the legislature's control of the State Bar's budget, based on detailed submissions on expenditures.

The State Bar recognizes that its status as a governmental entity is not a license to use the compelled fees of the State's practicing attorneys for unlimited purposes. Rather, the State Bar acts within the scope of its statutory authority,[8] both implicit and explicit, when attempting to inform its members, the public, the legislature and the judiciary on important issues concerning the state legal system.[9] The State Bar itself provides other protec-

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[7] Other states, by contrast, have not chosen to regulate their lawyers in this manner. No reported decision holds any other state bar to be a governmental agency with the explicit, detailed authorization given to the State Bar of California.

[8] *Keller, supra*, 47 Cal. 3d at 1169-70. Petitioners could not and did not show that any of the activities they challenge are outside the scope of the State Bar's authorization; the record below, setting forth the nature and scope of its activities, demonstrates that the activities are authorized. *See* Minute Order, Superior Court, March 19, 1984 (specifically finding that all of the challenged activities are statutorily authorized). (Joint Appendix at 478.)

[9] A Joint Commission on Discovery, made up of representatives of the State Bar and the Judicial Council, recommended a package of reforms in civil discovery which were adopted in the Civil Discovery Act of 1986, Code of Civil Proceedure § 2016, et seq. This joint project

tions that ensure each lawyer a fair opportunity to be heard. *See infra* at pp. 17-18.

B. California's Determination of the Nature of Its Bar And The Scope Of Its Authorized Activities Is A Matter Of State Law

The highest court in California has ruled that the State Bar of California, a creation of state law, is governmental in nature. *Keller, supra*, 47 Cal. 3d at 1162-65. Petitioners

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of the State Bar and the Judicial Council was possible only because both the Judicial Council and the State Bar are governmental entities. *See California Lawyer*, Dec. 1985, at 78; *California Lawyer*, Dec. 1986, at 84.

The State Bar was a co-sponsor of AB 3300, the Trial Court Delay Reduction Act (Brown). Subsequently, the State Bar and the Judicial Council formed a Statewide Delay Reduction Consortium, focusing on implementation of delay reduction. This joint effort to implement one of the most important current reforms in the administration of justice would not be possible outside the structure of the unified bar. *See California Lawyer*, Dec. 1987, at 75.

The State Bar and its committees and sections provide assistance to the Legislature on many legislative proposals affecting the administration of justice. By virtue of the integrated bar structure, the State Bar provides a balanced perspective, resulting from bar entities reflecting the diversity of the legal profession.

Because of the integrated bar structure in California, the Legislature is able to view the regulation of the legal profession in far broader terms than traditional admissions and discipline. For example, the Legislature recently adopted legislation calling upon the State Bar to regulate both not-for-profit and for-profit lawyer referral services based on rules adopted by the Supreme Court of California. *See California Lawyer*, Dec. 1986, at 79, 85. Another example is client protection through the Client Security Fund, Bus. & Prof. Code § 6140.5, and the availability of professional liability insurance for lawyers.

have conceded this fact.[10] (Petition at 4, fn. 1; Brief at 6, fn.3.) In addition, the California Supreme Court has determined that all of the challenged activities, with the exception of participation in judicial elections, are authorized by the explicit and implicit mandates of legislative enactments and constitutional provisions. *Keller, supra*, 47 Cal. 3d at 1169-72. Thus, in this case, it has now been conclusively determined under state law that 1) the State Bar is a governmental entity; 2) it is charged with both regulating attorneys and improving the administration of justice; and 3) all the challenged activities are authorized by California law.

The regulation of lawyers is a matter traditionally left to the states. *See e.g., Schware v. Board of Bar Examiners*, 353 U.S. 232, 239, 1 L. Ed. 2d 796, 77 S. Ct. 752 (1957); *see also id.* at 248 (Frankfurter, J., concurring). Each state has latitude to determine the most appropriate means of governing its lawyers, to permit the most efficient and effective use of its resources. California has chosen to govern its now approximately 122,000 lawyers through a state agency, whose governing board includes nonlawyers appointed by senior state officials. Its operations are regulated specifically by constitutional and statutory provisions, as well as by direct legislative oversight. These factors, among others, in the view of the California Supreme Court, demonstrate that the State Bar is not a private entity, but governmental in nature, bound by First Amendment restrictions on government speech. That decision is binding. *Lathrop, supra*, 367 U.S. at 828 (Wis-

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[10] In so doing, petitioners also abandoned any challenge to the state law ruling tht the State Bar is a California governmental entity and subject to the restrictions and protections adhering to such entities under California law. *See Stanson v. Mott, supra*, 17 Cal. 3d 206.

consin Supreme Court's interpretation of its integration order is binding).

An analysis of the constitutionality of the policy choices made by California in regulating the legal profession involves an examination of the nature and purpose of the state policy, and of the State Bar. This initial analysis is a matter of state law. *Standard Oil of Calif. v. Johnson*, 316 U.S. 481, 483, 86 L. Ed. 1611, 62 S. Ct. 1168 (1942). *See also Posadas de Puerto Rico Ass'n v. Tourism Co.*, 478 U.S. 328, 339 & n.6, 92 L. Ed. 2d 266, 106 S. Ct. 2968 (1986) (deferring to Puerto Rico's construction of law affecting speech).

Furthermore, there is no need for a federal rule mandating uniform treatment of all state bars. States should be free to make policy choices on how to regulate the legal profession in response to their diverse circumstances, as they are free to formulate other legal relationships. *See* P. Bator, D. Meltzer, P. Mishkin, D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* at 533 (3d ed. 1988). Treatment of state bars should be responsive to and reflective of this diversity.[11]

[11] Labor law is highly federalized by the National Labor Relations Act and its amendments in the Labor Management Relations Act, 29 U.S.C. §§ 141, et seq., as well as by the Railway Labor Act, 45 U.S.C. 151, et seq. State labor regulation is limited by broad principles of federal preemption, *see, e.g., Garner v. Teamsters Local 776*, 346 U.S. 485, 98 L.Ed. 228, 74 S.Ct. 161 (1953). Thus, the states never have been free to develop their own concepts of unionism outside the long shadow of federal law. By contrast, Congress left the field of regulation of the practice of law entirely to the states.

C. The State Bar's Public Purpose And Role In The State Governmental System Place Its Activities Squarely Within Government Speech Doctrine

The State Bar possesses both the essential functional and structural attributes of a governmental agency. It is constrained by the public interest, which is enforced through the democratic process. The existence of this constraint and its attendant enforcement mechanism justify the latitude the courts have given the government in exercising its powers of speech. *See Abood v. Detroit Board of Educ.*, 431 U.S. 209, 259 n.13, 52 L. Ed. 261, 97 S. Ct. 1782 (1977) (Powell, J., concurring).

1. The Test For Government Speech Is Rational Relationship To A Legitimate Governmental End

Government must speak in order to govern. Therefore it may use tax revenue for speech activities rationally related to a legitimate governmental objective. *See Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547-48, 76 L. Ed. 2d 129, 103 S. Ct. 1997 (1983). Labeling the objective as "political or ideological" does not alter this analysis. *See American Party of Texas v. White*, 415 U.S. 767, 39 L. Ed. 2d 744, 94 S. Ct. 1296 (1974) (rejecting equal protection challenge based on speech and association to Texas legislature's reimbursement of two major political parties' primary expenses); *Common Cause v. Bolger*, 574 F. Supp. 672 (D.D.C. 1982), *aff'd*, 461 U.S. 911, 77 L. Ed. 2d 280, 103 S. Ct. 1888 (1983) (upholding incumbent's franking privilege despite enhancement of incumbent's speech). Dissenters simply have no right to silence the government's affirmation of the values it was elected to promote. *See* L. Tribe, *American Constitutional Law* § 12-4 at 807 (1988).

Indeed, government speech is inherently political. The government must take substantive positions and decide disputed issues to govern. *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023, 75 L.Ed.2d 495, 103 S.Ct. 1274 (1983) (state-sponsored television station may exercise editorial discretion which of necessity encompasses political issues). So long as it bases its actions on legitimate goals, government may speak despite citizen disagreement with the content of its message, for government is not required to be content-neutral. *Muir*, 688 F.2d at 1050 (Rubin, J., concurring).[12]

As this Court noted in *FCC v. League of Women Voters of California*, 468 U.S. 364, 385 n.16, 82 L. Ed. 2d 278, 104 S. Ct. 3106 (1984), virtually every legislative appropriation will to some extent involve a use to which some taxpayers may object. "Nevertheless, this does not mean that those taxpayers have a constitutionally protected right to enjoin such expenditures." *Id. See also Pacific Gas and Electric Co. v. California P.U.C.*, 475 U.S. 1, 24 n.3, 89 L.Ed.2d 1, 106 S.Ct. 903 (1986) (Marshall, J., concurring) (government subsidy of a preferred speaker causes no interference with anyone else's speech).

> "[T]he reason for permitting the Government to compel the payment of taxes and to spend money on controversial projects is that the Government is representative of the people." *Abood, supra*, 431 U.S. at 259, n.13 (Powell, J., concurring).

[12]Examples of illegitimate governmental goals include censorship, *id.* at 1052, drowning out other speech, *Miller v. California Commission on the Status of Women*, 151 Cal. App. 3d 693, 198 Cal. Rptr. 877, *appeal dismissed for want of jurisdiction*, 469 U.S. 806, 83 L. Ed. 2d 15, 105 S. Ct. 64 (1984), and interference with the political process by government electioneering, *Stanson v. Mott*, 17 Cal. 3d 206, 130 Cal. Rptr. 697 (1976).

Dissenters who object to the way in which their taxes are spent have recourse within the democratic process. *Miller, supra*, 151 Cal. App. 3d at 701 n. 12, 702 (taxpayers who disagree with speech by state commission can attend its public meetings and use the electoral process to defeat legislators who appointed the commissioners and supported their positions).

Petitioners too have recourse to the democratic process to express their disagreement with the State Bar's positions. They can vote out of office those legislators who support the positions of the State Bar and approve of its activities and its funding. Because the Legislature not only controls the State Bar's ability to fund itself, but also contracts and expands the Bar's statutory powers, Petitioners have recourse to their legislators to affect the State Bar's powers.[13] Finally, the structure of the State Bar itself permits Petitioners to take a direct hand in shaping policy through the addition of their voices to, rather than the silencing of, other members of the State Bar.[14] An individual lawyer may join a section or committee; seek to become a delegate to the Conference of

[13]Indeed, in 1984, objectors to the State Bar's practice of evaluating sitting justices obtained passage of Bus. & Prof. Code § 6031(b), which prohibits the State Bar from evaluating specific justices without prior legislative approval.

[14]There is another fundamental consideration involved: avoiding content-based regulation. Petitioners violate this principle in their attempt to prevent speech by the State Bar. The decisions of this Court in both *Pacific Gas & Electric* and *League of Women Voters* clearly relied on this principle to forbid any restriction on speech, even government-supported speech, that looked to the content of the speech to determine the protection to which it was entitled. *Pacific Gas & Electric, supra*, 475 U.S. at 12-15; *League of Women Voters, supra*, 468 U.S. at 383-84. This principle thus prohibits the kind of analysis, based on content, that Petitioners seek to impose.

Delegates, support or oppose, orally or in writing, legislative positions proposed by the Committee on Legislation before their adoption; attend and speak at the Board of Governors meetings, or file written comments; vote for Board of Governors members not appointed by State authorities; become a candidate for election to the Board of Governors; and support or oppose Board legislative positions at the Legislature. See Declarations of Mary Wailes, Joint Appendix at 460-76.

2. The Source of the Funds Does Not Change the Result

It is the use of the funds for legitimate governmental purposes, not the method of collection or the breadth of the tax base, that is the criterion. Although Petitioners argue that only general tax revenues may be spent for government speech (Petitioners' Brief at 22-23), government may impose special taxes on limited groups to govern, within the limits of the democratic process. *See United States v. Lee*, 455 U.S. 252, 71 L. Ed. 2d 127, 102 S. Ct. 1051 (1982) (rejecting First Amendment challenge to payment of social security tax based on employer's religious objection to use of revenues); *Keller, supra*, 47 Cal. 3d at 1163 & n.8 (reclamation districts, water districts and school districts are governmental and have power to tax); *Erzinger v. Regents of the University of California*, 137 Cal. App. 3d 389, 187 Cal. Rptr. 164 (1982), *cert. denied*, 462 U.S. 1133, 77 L. Ed. 2d 1368, 103 S. Ct. 3114 (1983) (rejecting First Amendment challenge to use of mandatory student fees for abortion services).[10]

[10]Petitioners cite *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), as support for the proposition that the State Bar is not governed by the government speech doctrine. However, there are fundamental distinctions between the entities at issue. *Frame* involved a challenge to a promotional self-help program to reverse the decline of the beef industry, which was funded by assessments on beef producers to advertise beef. Noting that the issue was a "close one," the court declined to hold that the challenged advertising was government speech, basing its holding on two grounds. First, as the speech was not identified as governmental, the beef producers themselves, not the government, were strongly identified as the speakers. Second, the purpose of the program was self-help for the industry, and was ... as functionally more akin to a union than a unit of government concerned with the public interest. Neither circumstance is presented by this case; far from being a close case like *Frame*, this case falls well within established government speech doctrine.

Further, the court upheld the challenged program in *Frame* despite its finding that government speech was not involved, because it found that the program served a compelling governmental interest — that of the survival of the beef industry. Surely the improvement of the administration of justice is compelling under this standard.

The logic permitting such directed taxation is straightforward. If, for example, the Legislature placed a tax on lawyers for general revenues and supported the Bar's functions from general revenues, no argument could be made that the activities were improperly funded. *See, e.g.*, 16 U.S.C. § 460*l*-6a (national parks admission and special recreation use fees); California Bus. & Prof. Code § 16100 (collection by counties of license fees from businesses). What the Legislature has done here is identical in substance, and should be equally valid. *See Lathrop*, 367 U.S. at 864-65 (Harlan, J., concurring) ("a state legislature could certainly appoint a commission to make recommendations to it on the desirability of passing or modifying any of the countless uniform laws .... It seems no less clear to me that a reasonable license tax can be imposed on the profession of being a lawyer, doctor, dentist, etc."). *See also Royall v. Virginia*, 116 U.S. 572, 580, 29 L. Ed. 735, 6 S. Ct. 510 (1886) ("The granting of a license,

therefore, must be regarded as nothing more than a mere form of imposing a tax").

3. The State Bar's Speech Is Rationally Related To A Legitimate Governmental End

The State Bar's goal in engaging in all of the speech activities challenged by petitioners is the same: to fulfill its mandated responsibilities, including improving the administration of justice. This Court already has ruled that this goal is a legitimate one. *Lathrop*, *supra*, 367 U.S. at 843. Nothing in the record supports a finding to the contrary.

The means chosen by the State Bar — the filing of *amicus* briefs, lobbying the legislature, and holding the annual Conference of Delegates — are rationally related to this goal. Indeed, these activities directly serve the State Bar's mandate to improve the legal system.

a. Amicus Briefs Are Properly Within The State Bar's Province

Communicating with the courts on issues of concern to the legal community plainly promotes the State Bar's mandate to aid in the administration of justice, as well as informing the courts on matters pertaining to lawyers' activities and obligations, and to fair enforcement of the law. The filing of *amicus* briefs is the most effective, and indeed the only way in which the State Bar readily can carry on this dialogue. As California's mandated representative of the legal community, the State Bar has an important role to play as a friend of the court. *See Young Americans For Freedom v. Gorton*, 91 Wash. 2d 204, 588 P.2d 195 (Wash. 1978) (government has legitimate interest in informing court through amicus brief of state policy in favor of affirmative action).

This analysis holds true for the two briefs challenged by petitioners. The State Bar, as *amicus* in both cases, sought to inform the courts on matters in which it had historical involvement pursuant to its role in State government. The State Bar's amicus brief in the Victim's Bill of Rights case, *Brosnahan v. Brown*, discussed the effect of that ballot proposition on Evidence Code provisions drafted jointly by the State Bar and the Law Revision Commission. *See* Declaration of Truitt A. Richey, Joint Appendix at 447. The State Bar's amicus brief in the prison case, *Touissaint v. Yokey*, informed the courts of the results of thirty years of studies and recommendations made by the State Bar concerning the prison system. *See id.* at 449. Communication with the courts on statutes it has drafted and conditions it has studied is directly related to the improvement of the administration of justice, and is a role for which the State Bar is uniquely suited, as is evidenced by the fact that several *amicus* briefs were filed by the State Bar at the courts' request. *See* Joint Appendix at 447-50.

Petitioners may indeed hold a different conception of the scope of the law in these areas than does the majority of the State Bar. But some attorneys also disagree with the ethical standards formulated for their professional conduct, some of which cut very deeply into the personal standards and beliefs of the members. *See, e.g.*, California Rule of Professional Conduct 3-320 (attorney must inform client of intimate personal relationship with attorney for another party). While Petitioners concede that formulation of ethical rules and their enforcement are germane to the State Bar's function and thus proper, there is no principled basis for distinguishing between the two activities either on the basis of their ideological content or on their relation to the State Bar's functions. Both activities directly serve important state interests.

b. The State Bar's Lobbying Is Proper

Petitioners' challenge to the State Bar's lobbying activities is even less specific than their challenge to its *amicus* filings. They simply provide a selective list of issues on which the State Bar lobbied the Legislature and then summarily assert that "[n]one of these related to the operation of the court system, delivery of legal services, or improvement of the profession." Petitioners' Brief at 25. This assertion is incorrect. Legislation on child support directly relates to the operation of the family court system and the rules governing family relationships. Legislation establishing criminal penalties directly relates to the operation of the criminal court system. The issue of sex discrimination implicates not only the court system but also improvement of the legal profession. *See Hishon v. King & Spalding*, 467 U.S. 69, 81 L.Ed.2d 59, 104 S.Ct. 2229 (1984).

Furthermore, the State Bar's lobbying activities are justified by its purposes in improving the administration of justice and in regulating the legal profession. Lobbying to improve the family law system, the environmental protection laws, or to ensure fair criminal penalties goes to the heart of the legal system, as does lobbying for disciplinary rules or regulations to improve the delivery of legal services.

Individuals speak to the Legislature through the power of the vote and of the purse. The State Bar's dialogue with the Legislature is accomplished in a different manner. The Legislature speaks to the State Bar by imposing various tasks upon it and by controlling its funding; the State Bar in turn speaks to the Legislature through its lobbying for improvements to the laws. *See Lehane v. City and County of San Francisco*, 30 Cal. App. 3d 1051, 106 Cal. Rptr. 918 (1972), *appeal dismissed*, 410 U.S. 962, 35 L.Ed.2d 698, 93 S.Ct. 1445 (1973) (upholding power of

governmental entity to lobby the Legislature). If the State Bar cannot lobby the Legislature, then the Legislature is deprived of the benefits of skilled judgment in considering legislation. *See First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781-82 & n.18, 55 L. Ed. 2d 707, 98 S. Ct. 1407 (1978).

c. The Conference Of Delegates' Speech Should Not Be Restrained

The Conference of Delegates is a yearly conference attended by representatives of various local and special interest bar associations at which topics of interest to the delegates and their constituents are discussed. Petitioners fail to reveal to this Court what the Conference is or why it exists. The Conference is a forum for the expression of members' views, from every locality and specialized interest, including those with which petitioners agree and those with which petitioners disagree.[16] Points of view divergent from the State Bar leadership are represented as members of the State Bar communicate with one another on topics of concern to them as members of the legal community. Finally, by encouraging communication among various bar groups, the Conference also serves a social function. This Court approved similar annual meetings and social events in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 447, 80 L.Ed.2d 428, 104 S.Ct. 1883 (1984), one of the union cases Petitioners urge this Court to apply here.

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[16]The discussions at the Conference neither reflect nor necessarily result in State Bar policy, but are the views of the members on topics of interest to them, and sometimes policy recommendations to the Board of Governors. *See* Status of Resolutions set forth in Joint Appendix 382-409. Even so, they relate closely to the practice of law and improvement of the administration of justice. *See, e.g., id.* at 383 (confidentiality of grievance proceedings, pro bono legal services, lawyer referral services).

Petitioners seek to prohibit the speech of the delegates. Such a request directly violates the delegates' First Amendment rights. *Consolidated Edison v. Public Service Commission*, 447 U.S. 530, 65 L. Ed. 2d 319, 100 S. Ct. 2326 (1980) (invalidating prohibition against utility bill inserts discussing controversial issues). It would chill the speech of State Bar members, infringing on both their right to speak and their right to hear the speech of other members. *See Bellotti, supra*, 435 U.S. at 782. That Petitioners find offensive the speech of their fellow lawyers does not justify such censorship. *Consolidated Edison, supra*, 447 U.S. at 541-42.

Thus, the State Bar's activities enhance the governmental process because they add to the total quantum of speech. *See P.A.M. News Corp. v. Butz*, 514 F.2d 272, 278 (D.C. Cir. 1975) (government speech that increases flow of information enhances First Amendment values). In sum, the speech activities are proper under applicable First Amendment standards; as the analysis below shows, other First Amendment goals are also met.

D. No Protected Associational Rights Are Violated

1. The Associational Rights At Stake Are Limited

Despite this Court's ruling in *Lathrop, supra*, Petitioners contend that the State Bar violates their right of association. (Petitioners' Brief at 23). However, California's integrated bar has only a limited impact on Petitioners' interest in freedom of association. The association is neither intimate nor primarily expressive. In the absence of either type of relationship between Petitioners and the State Bar, Petitioners' free association claim must fail. *City of Dallas v. Stanglin*, 490 U.S. ___, 104 L. Ed. 2d 18, 26, 109 S. Ct. 1591 (1989).

a. No Intimate Association Is Implicated

This Court has held that it is the nature of the "compelled" association that determines the scope of protection granted. *Roberts v. United States Jaycees*, 468 U.S. 609, 620, 82 L. Ed. 2d 462, 104 S. Ct. 3244 (1984). In *Roberts*, the Court held that the Minnesota Jaycees organization could be required by state law to permit women to be members. Recognizing a spectrum of types of association ranging from intimate familial association to association in impersonal, large business organizations, the Court found that while choice concerning the former is constitutionally protected, forced association with entities or persons in larger organizations at the other end of the spectrum, such as the Jaycees, may not be protected. See also *Hishon, supra*, 467 U.S. 69 (right of partners of a law firm not to associate with a certain individual may take secondary position to other governmental and societal interests).

A high degree of selectivity and closeness characterizes protected intimate association. "Conversely, an association lacking these qualities — such as a large business enterprise — seems remote from the concerns giving rise to this constitutional protection." *Roberts, supra*, 468 U.S. at 620. Plainly, the latter description identifies a state bar of 122,000 lawyers, who are joined together by their common profession, and its concomitant public service obligations, but nothing more.

b. No Expressive Association Is Restrained

With respect to "expressive association," the integrated bar has a very limited effect on rights, and one that is more than balanced by the governmental interests at stake. Unlike *Roberts*, which concerned the "right to associate with others in pursuit of a wide variety of political,

social, economic, educational, religious and cultural ends," 468 U.S. at 622, this case concerns negative association rights. In *Roberts*, First Amendment rights were implicated because the Jaycees had chosen to join together, and the government sought to force them to include others. This Court found that such an antidiscrimination law did not impose "any serious burdens on the male members' freedom of expressive association." *Id.* at 626.

Here, however, Petitioners do not assert their own right to join with others for expressive purposes, nor has their ability to do so been impaired. This is not a case where individuals who have chosen to associate are being forced to recognize as members individuals they do not wish to include. Rather, Petitioners assert negative rights of expressive association — the right not to be personally associated with the expression of other lawyers in the State. The associational interests here thus differ markedly from those at stake in *Roberts* in numerous ways.

First, the State Bar is organized primarily to regulate the legal profession and to improve the administration of justice. The Bar has a wide range of programs to accomplish these goals; only a very few entail speech. *See* Joint Appendix at 77, 114. Although the Bar does engage in expressive activities to fulfill certain of its mandates, Petitioners are not compelled to associate in any way with the lawyers who choose to assist the State Bar in those expressive activities. Furthermore, the likelihood that Petitioners might be "associated," i.e., identified individually, with points of view expressed by the State Bar is small, and the degree of impact, if any, on their rights occasioned by such a connection is slight. *See infra* p. 28.

An individual lawyer is no more forced to be associated with any position taken by the State Bar than a bar owner

forced to pay a license fee to the department of alcoholic beverage control is supposed by his customers to be in agreement with the positions of that department. Nor is any lawyer more closely associated with the State Bar's views than is a university student whose fees are used in support of university activities. See *Erzinger, supra*, 137 Cal.App.3d 389.[17] The lawyer, the student, and the bar owner must each pay a fee but none must make any other commitment to the group or its activities. As this Court held in *Lathrop, supra*, the impact on associational rights from belonging to an integrated bar, even one that engages in expressive activities, is very limited and does not preclude compulsory membership. 367 U.S. at 827-28.

2. The State Bar Does Not Compel Petitioners To Affirm Any Belief

Petitioners' payment of fees to the State Bar does not require them to affirm its speech. As Justice Harlan noted in *Lathrop:*

> "What seems to me obvious is the large difference in degree between, on the one hand, being compelled to raise one's hand and recite a belief as one's own, and, on the other, being compelled to contribute dues to a bar association fund which is to be used in part to

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[17] *Erzinger* involved payment of general health fees to benefit all students, including health benefits such as abortion counseling to which some students objected. No associational rights were implicated. In contrast, in *Goode v. Associated Students of the University of Washington*, 541 P.2d 782, 86 Wash.2d 94 (1975) and *Galda v. Bloustein*, 686 F.2d 159 (3d Cir. 1982), *cert. denied*, 475 U.S. 1065, 89 L.Ed.2d 602, 106 S.Ct. 1375 (1986), students were required to support private organizations that were dedicated to purely expressive purposes. The fees were unrelated to the purposes for which the state universities levied student fees, while imposing a more direct link to objectionable expressive activity, and were accordingly held unconstitutional.

promote the expression of views in the name of the organization (not in the name of the dues payor), which views when adopted may turn out to be contrary to the views of the dues payor. I think this is a situation where the difference in degree is so great as to amount to a difference in substance." 367 U.S. at 858 (Harlan, J., concurring).

While the First Amendment precludes the government from forcing individuals to affirm a certain belief, that affirmance must be direct in order to prevent the government from speaking; the statement must be either closely linked to the individual, or force the individual to speak in order to disassociate himself from that position. Thus, government cannot force an individual to recite the pledge of allegiance and salute the flag, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 87 L. Ed. 1628, 63 S. Ct. 1178 (1943), nor can it force the individual to carry a slogan attached to his personal property by printing it on his automobile license plates, *Wooley v. Maynard*, 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977). Government expression of a point of view using taxpayer money, however, is not forbidden by these cases. *League of Women Voters, supra*, 468 U.S. at 385 n.16.

This case is at the other end of the spectrum from *Barnette* and *Wooley*. There is no direct association between any member of the State Bar and any public position taken by the Bar that rises to the level of personal affirmance disapproved in *Barnette*, nor is there a physical and constant proximity of expression similar to that forbidden in *Wooley*.[18]

[18]In *Pacific Gas and Electric Co., supra*, 475 U.S. 1, this Court confirmed the importance of proximity. The Court refused to require a utility to include within its mailing envelope material prepared by a group opposing the utility's point of view, reasoning that the physical proximity of that opposing statement could require the utility to speak to disassociate itself from the view being expressed, even though the utility might otherwise have chosen to exercise its right not to speak on that issue. 475 U.S. at 16. Like the owner of the car in *Wooley*, the utility could not be forced to use its own property to carry the message with which it disagreed. *Id.* at 17. Here, there is no proximity between the message put forward by the Bar and any individual; the difference in degreee remains a difference in substance.

E. The Different Purposes of Integrated Bars and Labor Unions Mandate Different Constitutional Treatment

The purposes for which integrated bars and labor unions are formed are fundamentally different, as are the reasons for permitting compelled membership or financial support of each. A labor union is a private organization created to serve the private, economic interests of its members; an integrated bar is created to serve the public interest by regulating its lawyers and educating, informing and assisting the public in areas where it has special knowledge, skills, and responsibilities.

The compulsion involved in a union or agency shop does serve a limited purpose beyond economics, in that it promotes labor peace by avoiding free riders who would benefit from collective bargaining. That interest, in preventing nonmembers from profiting from the union's representation of the bargaining unit as a whole without payment for that benefit, is financial as well. *See, e.g., NLRB v. General Motors Corp.*, 373 U.S. 734, 740-41, 10 L. Ed. 2d 670, 83 S. Ct. 1453 (1963). Thus, the essence of compulsory membership or funding of a labor union is to serve a collective bargaining function. *See* National Labor Relations Act § 2(5), 29 U.S.C. § 152(5) (defining labor

organization as existing for purpose of "dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work").

In contrast, the purposes of an integrated bar and the mandatory fees it receives are quite different. A bar does not regulate employer-employee relations, or serve as a collective bargaining agent. Instead, it may regulate lawyers, assist in the administration of justice, and counsel and aid other state agencies.

In Lathrop, supra, the Court approved the purpose of the integrated bar as "improving the quality of the legal service available" and "raising the quality of professional services." 367 U.S. at 843. The purposes of the Wisconsin bar, for which compulsory membership was approved, specifically included improving the administration of justice and providing a forum for discussion of "subjects pertaining to the practice of law, the science of jurisprudence, and law reform," all to discharge the public responsibilities of the profession. 367 U.S. at 828-29. The goals of the Wisconsin and California bars are essentially identical. Like California, Wisconsin viewed lobbying and the support of sections and committees as a means to achieve those goals. 367 U.S. at 829 n.7, 834-42.

The integrated bar is the vehicle through which lawyers fulfill their obligations to the courts and the public. Unlike many voluntary bar associations, formed to serve the special interests of their members, integrated bars must serve the public interest. That lawyers have special obligations to the public is an undisputed tenet of the profession, made necessary by the needs of the justice system to ensure fair and even-handed application of the laws. These special duties are also an outgrowth of special privileges and expertise not shared by other groups in

society. *See Mallard v. United States District Court,* 490 U.S. ____, 104 L. Ed. 2d 318, 332, 109 S. Ct. 1814 (1989). The bar has a responsibility to the public that is unique and different in degree from that expected of the members of other professions.

> "This body of our citizenry known to the laws of this state as 'attorneys and counselors at law' form an integral and indispensable unit in our system of administering justice .... Thus it is that the profession and practice of the law, while in a limited sense a matter of private choice and concern in so far as it relates to its emoluments, is essentially and more largely a matter of public interest and concern ...." *State Bar of California v. Superior Court, supra,* 207 Cal. at 330-31.

The State Bar of California "is not analogous to a labor union;" its functions include "promoting the improved administration of justice." *Keller, supra,* 47 Cal. 3d at 1166 n.12.

Fundamental differences between integrated bars and private economic organizations like labor unions require an analysis that recognizes those distinctions in evaluating their activities. To restrict bars to what is justified by collective bargaining is error:

> "The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same." *Pacific Gas & Elec. v. California P.U.C., supra,* 475 U.S. at 35 (Rehnquist, J., dissenting).

II.

UNDER THE ABOOD PRINCIPLES, THE CHALLENGED ACTIVITIES ARE PROPER

Petitioners seek to impose a different analysis of First Amendment rights, and to limit the State Bar by rules developed in the labor union context. Even were those cases applicable, however, the challenged activities would still be permissible.

A. The Union Cases Permit Activities Germane To The Organization's Purpose

Abood and its progeny found certain union speech activities violated the First Amendment rights of dissenters not because the dissenters were associated with the union which espoused such positions, but because the dues of the dissenters were used to promulgate them. *Abood, supra,* 431 U.S. at 235-36. In reviewing expenditures of compulsory dues, *Abood* looked first to the purpose which justified compulsory membership or support. This important function — collective bargaining — in that case gave rise to the *Abood* formulation forbidding expenditures for "political and ideological purposes not germane to its duties as collective bargaining representative." 431 U.S. at 232, 234.

Thus, if the challenged activity is relevant to the accepted purposes of the organization, the organization may use the compelled funds, even over dissent. What is precluded is the expenditure of compulsory dues for activities outside the functions that justify the compulsory membership or support, not merely activities with which petitioners disagree.

Germaneness to the purpose for which the organization exists is the standard, not "political" or "ideological" activity, as Petitioners insist. *Ellis, supra,* 466 U.S. at 456

(at a minimum, the union can spend dues "in support of activities germane to collective bargaining")[19]. If such expenditures involve additional interference with dissenters' First Amendment interests, they must be justified with respect to the governmental interest in the union shop. *Id.*[20]

Thus, proper application of the *Abood-Ellis* test here would require a two-step analysis: first, to determine the cause that justifies bringing together the lawyers who

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[19] *Ellis* also clarifies that the label "political," a point of contention among the various opinions in *Abood,* is not the test for whether an expenditure is permissible or not. *See Abood,* 431 U.S. at 243 (Rehnquist, J., concurring) ("the positions taken by public employees' unions in connection with their collective-bargaining activities inevitably touch upon political concern if the word 'political' be taken in its normal meaning"); *id.* at 257 (Powell, J., concurring) ("Collective bargaining in the public sector is 'political' in any meaningful sense of the word."). As *Ellis* puts it, "the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." 466 U.S. at 448.

[20] In applying this standard, the Court found that union conventions, publications and social activities imposed little additional impingement on First Amendment rights, and none that could not be justified by the governmental interest behind the union shop itself. *Id.* at 456.

Nothing in *Chicago Teachers Union v. Hudson,* 475 U.S. 292, 89 L. Ed. 2d 232, 106 S. Ct. 1066 (1986), modified this standard in any way. *Hudson* involved a challenge to procedures established by the union to rebate a portion of dues used for activities that the union conceded were not germane to its collective bargaining activities. Once a violation of the First Amendment is found, established law requires that procedural protections be narrowly tailored. This issue of procedural protections is not now, and never has been, tendered by Petitioners.

compose the State Bar; and second, to decide whether the challenged activity is germane to that purpose, and if so, to balance its contribution to that purpose against any potential interference with First Amendment interests.

B. The State Bar Is Not Required To Justify Its Activities By A Compelling State Interest

Payment of union dues may be compelled despite political activity by the union. *Abood, supra,* 431 U.S. at 235. Any interference with First Amendment rights that arises from the fact of compulsory membership "is constitutionally justified by the legislative assessment of the important contribution of the union shop to the system of labor relations established by Congress." *Id.* at 222. *See also Railway Employes' Dept. v. Hanson,* 351 U.S. 225, 233, 100 L.Ed. 1112, 76 S.Ct. 714 (1956). (Congress' judgment that union shop would promote labor peace was "an allowable one"). This Court has never required a union to justify its existence by proving it serves a compelling governmental interest, but only one that ranges from "legitimate" to "important." *See Hudson, supra,* 475 U.S. at 302-03 (governmental interest in labor peace is strong enough to support an agency shop).

Petitioners argue that a compelling state interest standard is applicable to California's integrated bar, although this standard was rejected in the union cases that they cite. This argument is foreclosed by *Lathrop. Lathrop's* determination that compulsory membership in the Wisconsin Bar did not unconstitutionally impair members' First Amendment rights has not been challenged, and remains compelling authority. *See* 367 U.S. at 843; *see also Levine v. Heffernan,* 864 F.2d 457 (7th Cir. 1988), *cert. denied,* ____ U.S. ____, 107 L. Ed. 2d 157, 110 S. Ct. 204 (1989). Thus, to the extent petitioners urge that compulsory membership in and financial support of the State Bar

is unconstitutional because they view certain State Bar activities as unsupported by a "compelling" state interest, their argument is belied by the very cases on which they rely.

C. The Challenged Activities Are Germane And Their Importance Outweighs Any Collateral Effect On First Amendment Rights

1. The Administration Of Justice Is An Appropriate Standard For Measuring State Bar Activities

Petitioners' distinction between regulatory activities, which they concede are proper for an integrated bar, and administration of justice activities, which they oppose, rests on the assumption that activities to improve the administration of justice do not justify an integrated bar. The contrary is true; administration of justice functions have been the primary reason for integrating State bars.

> "The administration of justice is the concern of the whole community, but it is the special concern of the bar. We are the ministers of justice, and no lawyer is worthy of any reputation in the profession, whatever his ability may be, if he does not regard himself first and last as a minister of justice in the community in which he practices.
>
> "This Conference has believed and has recorded its belief for many years that progress could be made through an organization in each state of the bar of the state which would be all-inclusive and which

> would bring all lawyers into a sense of their obligations and with a higher opportunity to exercise their privileges through membership in a state organized bar." 1 State Bar J. 3, 3-4 (1926) (*Reprinting* speech by the Hon. Charles Evans Hughes to Conference of Bar Delegates of American Bar Association).

The integrated bar, from its earliest days, has been the means "to bring home to the individual lawyer his responsibility to the profession and to provide him with power to discharge his duty." 2 Journal of the American Judicature Society 105, 106, "Redeeming a Profession" (1918).[21]

To accomplish these goals, authorizing legislation and constitutional provisions define a cohesive sphere limiting the State Bar's activities. As the California Supreme Court observed, the Bar's function

> "is not limited to promoting the self-interest of its members, but extends to promoting the improved administration of justice. Thus the bar is properly concerned with legislation other than just that which

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[21]The American Judicature Society, one of the first advocates of the integrated bar, stated:

> "... The range of activities of the [integrated bar] will not atop with the matter of admission and discipline, which are largely domestic policing; they will be constructive in ways now hardly dreamed of. There will be many opportunities for developing increased usefulness to all its members and the the public ....
>
> "Such an integrated bar would naturally, and with the greatest resources, address itself to the task of advising courts and legislatures with respect to simplifying procedure. It would form just such a sustaining body as our courts need and this alone would be reason enough in many states for its existence ...." *Id.* at 109-10.

> affects the earnings and working conditions of attorneys." 47 Cal. 3d at 1166 n.12.

Lawyers serve this function because "there are areas in which 'lawyers as lawyers have more to offer, to solve a given question, than other skilled persons or groups.' " *Lathrop, supra,* 367 U.S. at 863 (Harlan, J., concurring).

The State Bar acts collectively in areas broadly classified as regulation of the profession and improvement of the administration of justice. Petitioners concede that regulation of the profession includes admission to practice, disciplinary activities, and formulation of ethical standards. This area also includes enforcement of attorneys' obligations to deliver legal services. *See Mallard, supra,* 104 L. Ed. 2d at 332 (recognizing lawyer's ethical obligations to volunteer time to ensure the delivery of legal services).

In addition to ensuring access to the courts, administration of justice extends to informing the legislature in areas of the Bar's expertise through law revision commissions, judicial councils, and lobbying. It includes assisting the judiciary and the public, through service on commissions on judicial performance, evaluation of potential judges, the filing of *amicus* briefs, and assisting in continuing legal education and other client protection measures. See *Keller, supra,* 47 Cal.3d at 1169.

Activities in all the approved areas serve the public interest by ensuring access to the courts and adequate representation, as well as improving the quality of the laws and the fairness and consistency of their enforcement. Petitioners respond to the detailed authorization of the State Bar's activities with categorical attacks on all lobbying, all *amicus* briefs, and all activities of the Conference of Delegates. They do not seek to examine any

specific action to determine if it serves the administration of justice. Given the importance of that organizing principle, however, such a conceptual attack is not sufficient to invalidate the State Bar's administration of justice activities.[22] Rather, because the concept of administration of justice is an appropriate basis for the requirement of compulsory membership, it properly serves as the measure of the germaneness of the challenged activities.

2. The Challenged Activities Are Germane To The Authorized Purposes Of The State Bar

Petitioners' brief on the merits addresses three challenged groups of activities. First, Petitioners attack the State Bar's filing of *amicus* briefs, both in general and in two specific instances: one brief questioning the constitutionality of an initiative passed by the public known popularly as the Victim's Bill of Rights, the second supporting a challenge to the constitutionality of prison conditions in California. Petitioners next attack the entirety of the subjects on which the State Bar has lobbied the Legislature, even those related to admission and discipline, which Petitioners concede are germane. Finally, Petitioners attack the annual meetings of the Conference of Delegates.[23]

These three activities are unquestionably germane to the State Bar's purpose: they represent the means by which the State Bar communicates with the courts, the Legislature, and its members in fulfilling its obligation to improve the legal system. Their importance is sufficient to justify any collateral burden placed on Petitioners beyond that caused by compulsory membership itself. *See supra* pp. 20-24.

Through each of these activities the State Bar communicates with other governmental entities and the public. For example, the State Bar lobbies to inform the Legislature of relevant facts and law on issues as to which it has special knowledge or expertise. Petitioners seek to avoid the required reasoned analysis of the State interests at stake by using the sometimes pejorative label "lobbying" as a replacement for the facts. A fair analysis of the facts also demonstrates that the State Bar's amicus program serves the courts' needs for information on important legal issues. The courts themselves have asked the State Bar to file *amicus* briefs to supplement the information they receive from the parties. *See* Joint Appendix at 447-50.

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[22]This Court found administration of justice functions similar to those performed by the State Bar sufficiently weighty to reject the First Amendment challenge presented to the constitutionality of the Wisconsin integrated bar in *Lathrop, supra*, 367 U.S. at 843. *See also Levine v. Heffernan, supra*, 864 F.2d 457. Thus, as in Wisconsin the purpose of the compulsory membership is not limited to regulation of practice, but includes the other activities mandated by the Legislature to improve the administration of justice. *Lathrop*, 367 U.S. at 843; *see also Hollar v. Government of the Virgin Islands*, 857 F.2d 163, 169 (3d Cir. 1988); *Sams v. Olah*, 225 Ga. 497, 169 S.E.2d 790 (1969), *cert. denied*, 397 U.S. 914, 25 L.Ed.2d 94, 90 S.Ct. 916 (1970).

[23]Petitioners' failure to state specific objections is one of a series of reasons that this case may not present the best vehicle for deciding the rules to be applied to integrated bars. The resolution of the only specific activity objected to — the 1982 judicial retention campaign — leaves a factual record created solely by summary judgment motions, and containing only categorical objections to types of activities rather than specified actions. In addition, as set forth above, the State Bar's structure as a governmental agency differs in important respects from other state bars. On this record, petitioners seek to *enjoin speech*, not simply recover a portion of the fees paid, despite this Court's refusal to permit such relief in the union cases.

Finally, the State Bar holds its Conference of Delegates to ensure a forum for lawyers to discuss issues of importance to the legal community. *Ellis* upheld use of compulsory union dues to fund conventions at which union officials were elected, despite the fact that various politicians attended and addressed the conventions. Ellis, *supra,* 466 U.S. at 447 and 449 (Powell, J., concurring in part and dissenting in part). The State Bar submits that the purpose activating the Conference of Delegates is broader and the intrusion narrower than in *Ellis;* thus the Conference of Delegates passes constitutional muster.

3. The State Interest Outweighs Any Impingement On Dissenters' First Amendment Interests

Petitioners, as lawyers in California, are mandated to pay annual fees to the State Bar, but need do nothing else. *Keller,* 47 Cal. 3d at 1157. Although Petitioners allege that their First Amendment rights are infringed by the State Bar's use of their fees to take positions with which they disagree, the actual impact on Petitioners from this activity is minimal. Balanced against the strength of the interest served by the State Bar's activities, this minimal infringement does not rise to the level of a constitutional violation.

Little additional impingement on Petitioners' speech rights is created by the challenged activities, as Petitioners' membership in the Bar is statutorily mandated, and comes about only as a result of their chosen profession. Thus, Petitioners are not branded with the views of the State Bar as their own. *See Wooley, supra, Barnette, supra.* Because they are not likely to be identified with the speech of the State Bar simply because they are among California's 122,000 lawyers, Petitioners are not forced to speak in order to disassociate themselves with that

speech. Moreover, they are free to disavow the State Bar's positions. Under these circumstances, the First Amendment infringement is minimal. *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 87, 64 L. Ed. 2d 741, 100 S. Ct. 2035 (1980). Furthermore, any impingement that might be found is more than justified by the large contribution these activities make towards fulfilling the State Bar's obligation to aid in the continued improvement of the legal system.

The fact that Petitioners are required to subsidize speech with which they may disagree does not, standing alone, alter the balance. As this Court noted in *Abood,* an employee may have ideological objections to many activities undertaken by a union in its role as exclusive representative. The interference with First Amendment rights that results from such activities, however, does not invalidate them. 431 U.S. at 222-23. The question is where to draw the line between the needs underlying the creation of the group and the rights of the individual. The germaneness test accomplishes this line-drawing for labor unions, balancing the needs of the group against the rights of the individual. If these rules were applicable to the State Bar, the line would properly be drawn between laws and political campaigning. *See* pp. 44-45, *infra.*

In sum, the challenged methods for lawyers to communicate with each other, the courts, the legislature and the public have been in force for 60 years precisely because they serve the interests the State Bar was created to serve. The State Bar's performance of these duties, and the support of this activity by all the lawyers in the State, help discharge the special responsibilities that attach to all members of the legal profession. This public interest in the progress of the rule of law, not mere economic self-interest or labor peace, is the scope of representation of

the State Bar. *See Herron, supra,* 212 Cal.196. Given the public interest inherent in the practice of law, lawyers cannot simply opt out of their support for certain authorized activities of the State Bar by defining the public interest in their profession as narrowly as possible, any more than union members can opt out of paying for their fair share of maintaining labor peace.

D. The Strict Scrutiny Standard of Review Does Not Alter The Result

1. Strict Scrutiny Does Not Apply To The State Bar's Activities

As set forth at p. 34, *supra,* this Court refused to apply strict scrutiny to union activities. Nevertheless, Petitioners urge that it be applied to the State Bar. Strict scrutiny requires a close review of the fit between the means (compulsory membership and fees) and the ends (performance of a legislatively mandated function) to ensure that it is "carefully tailored." *Roberts, supra,* 468 U.S. at 623. This review entails a search for less restrictive alternatives. *Id.* However, Petitioners have never offered any alternative means for achieving the State Bar's goals; they wish simply to abolish all of the legislatively determined functions outside of the area that they call regulation of practice. This suggests that no more narrowly tailored means exist.

Some *amici* supporting Petitioners have suggested dividing Bar activities between those funded by mandatory dues and those funded by voluntary dues. This alternative does not provide a workable, predictable line that would permit the State Bar to function. *See Keller,* 47 Cal. 3d at 1165-66.

For example, the Legislature requires the Bar to assist the Law Revision Commission in studying and recommending improvements to the laws. Gov't Code § 8287. If only voluntary dues may be used for Law Revision Commission assistance, the ability to comply with the Legislature's commands becomes contingent on the interest of lawyers in financially assisting governmental functions.[24] Requiring such funding to be voluntary would impair the Bar's ability to comply with the mandated function, and thus the Legislature's ability to command it to be done. Such an interference with the operation of state government is not supported by any authority and runs counter to the basic principles of federalism.

First Amendment law does not limit compelled contributions to the study and improvement of laws by governmentally composed commissions. *Lathrop,* 367 U.S. at 864-65 (Harlan, J., concurring). *Cf. FCC v. League of Women Voters, supra,* 468 U.S. at 385 n.16. What Petitioners seek is a federal judicial intrusion into constitutionally permissible state legislative choices.[25] *See Lathrop, supra,* 367 U.S. at 850 (Harlan, J., concurring) ("I do not understand why it should become unconstitutional for the

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[24]Rational economic actors could well prefer lower bar dues to participating in funding State Bar programs, even if they had no philosophical disagreement with the purpose of the spending. Voluntary taxation is not an effective method of raising revenue.

[25]The examples could be multiplied. Pursuant to Government Code § 68725, the State Bar must assist the Commission on Judicial Performance. Government Code § 12011.5 requires the State Bar to evaluate the qualifications of and make recommendations to the governor concerning potential appointees or nominees for judicial office. Obviously, performance of such functions inherently breeds controversy. Nonetheless, their importance cannot be denied. The State Bar could not effectively carry out these activities if it had to take referenda on each task referred to it under these statutes and then cut its budget to fit the views of dissenters.

State Bar to use appellant's dues to fulfill some of the very purposes for which it was established").

A less radical alternative than that suggested by Petitioners might be to decide permissible expenditures on a case-by-case basis. However, this approach presents numerous problems, including lack of predictability, and would chill the State Bar's speech. Given the State Bar's statutory and constitutional mandate, and the fact that the legal system permeates the fabric of our society, it is not possible to draw bright lines delineating what legal issues are and are not the State Bar's business. As the court below noted, "Laws are the business of lawyers." *Keller,* 47 Cal. 3d at 1169.[26]

There is, however, a clear line that can be and has been drawn. It was drawn by the California Supreme Court in *Stanson v. Mott, supra,* 17 Cal. 3d 206, and again in its opinion below. Under these cases, the State Bar cannot use dissenters' dues for partisan electoral purposes. The State Bar may not campaign for politicians or specific

[26]The unpredictability and confusion resulting from application of such a standard is starkly illustrated by the different results obtained by the two appellate courts that have applied it. In *Gibson v. the Florida Bar,* 798 F.2d 1564 (11th Cir. 1986) the court limited the permissible sphere of activities funded by compulsory dues to those pertaining to the role of the lawyer in the judicial system and society, such as regulation of attorneys, budget appropriations for judiciary and legal aid, proposed changes in litigation procedures, regulation of client trust accounts and admission standards. 798 F.2d at 1569 & n.4. In *Hollar v. Government of the Virgin Islands,* 857 F.2d 163 (3d Cir. 1988), the court took a broader view of permissible activities as those related to "the promotion of a just legal system," *id.* at 169, which encompassed a statement concerning the settlement of a labor dispute and social activities. *Id.* at 170. Starting from the same test, these two courts achieved strikingly different results.

judges or ballot initiatives using compulsory dues. This is a stable, predictable and philosophically justifiable line.[27]

2. The State Bar's Activities Survive Strict Scrutiny

Even if a strict scrutiny standard of review were applicable here, the State Bar's activities would be constitutionally permissible. The public service function justifing the State Bar's activities is undoubtedly a compelling state interest. *Lathrop, supra,* 367 U.S. at 848 (Harlan, J., concurring); *Mallard, supra,* 104 L. Ed. 2d at 332 (Kennedy, J., concurring) (lawyers have obligations by virtue of their special status as officers of the court). Indeed, the majority of courts to consider the constitutionality of state bar expenditures have found this interest to be compelling. *Gibson, supra,* 798 F.2d at 1568 ("the Bar's capacity and responsibility to advise and educate gives rise to a compelling governmental interest distinct from that of the labor union"); *Falk v. State Bar of Michigan,* 418 Mich. 270, 342 N.W.2d 504, 513 (1981), *cert. denied,* 469 U.S. 925, 83 L.Ed.2d 253, 105 S.Ct. 315 (1985) (separate opinion of Boyle, J.) (legislature has "keen interest" in Bar's input); *Petition of Chapman,* 128 N.H. 24, 509 A.2d 753, 757 (1986) ("crucial role"); *Hollar, supra* (upholding variety of bar activities).

Lobbying the Legislature on behalf of law reform, filing *amicus* briefs on various issues of legal moment, and sponsoring free and frank exchanges among lawyers of views on current legal issues all directly advance the State Bar's mandate of improving the administration of justice in California. Indeed, these are the State Bar's

[27]It should be noted that the event precipitating the *Gibson* lawsuit, the advocacy by the Florida Bar of a ballot proposition, *see* 798 F.2d at 1566, would be forbidden in advance by the *Stanson/Keller* standard, whereas the other challenged activities would not.

most effective tools for communicating and sharing its expertise with the Legislature, the executive branch, the courts and the public. *Keller,* 47 Cal. 3d at 1169 & n.20.

No less restrictive means are available to enable the State Bar to fully accomplish its essential functions. Because a labor union is legitimized by the state interest in labor peace, categories of expenditures such as lobbying and litigation (that do not concern its specific collective bargaining agreement) can be delineated in advance as outside its essential purpose, and dues prorated accordingly. *Ellis, supra,* 466 U.S. at 448-51. The State Bar's public service role, in contrast, precludes such a broad categorical approach to its spending. As noted above, viewed as general categories, lobbying and litigation are natural means to accomplish the State Bar's responsibilities to assist in improving the legal system.

Although the State Bar sets forth in its yearly budget to the Legislature the amounts to be spent for categories of activities such as lobbying and the filing of *amicus* briefs, the substantive content of these activities cannot be determined in advance. The State Bar simply cannot know at the outset of the year which cases will be taken by appellate courts and thus cannot identify in its budget the subjects of its intended *amicus* briefs. Similarly, the State Bar cannot know in advance the substance of bills affecting the legal system that will be brought up in the Legislature.[28]

[28]Thus, it is not possible to set up a *Hudson*-type escrow system in advance of the State Bar's spending. Indeed, a *Hudson* system breaks down entirely when applied to an activity such as the annual Conference of Delegates. It is known in advance that the yearly meeting will discuss topics of interest to the legal community. However, it is not possible to predict in advance what issues may be injected into the Conference by individual delegates, and it would be impossible to require the Bar to attempt to calculate at the inception of each year the percentage of time that will be spent at the conference on noncontroversial issues and housekeeping matters, versus issues that may be raised by individual delegates with whom petitioners may disagree. *Cf. Ellis, supra,* 466 U.S. at 448 (union's annual meeting serves interest sufficient to outweigh any impingement on dissenter's First Amendment rights despite political speeches unrelated to collective bargaining).

Thus, any system requiring the determinations suggested by the labor cases will make it impossible for the State Bar to carry out its important governmental functions. *Keller,* 47 Cal. 3d at 1165-66. Existing law does not require this Court to curtail the operations of California government.

CONCLUSION

The State Bar has posed two questions that lie at the heart of this case. The first, whether the integrated bar may serve both regulatory and administration of justice functions, was answered affirmatively almost thirty years ago by this Court in *Lathrop.* The circumstances presented by this case provide no reason to abandon that decision.

The second question, whether compelled fees may be used to advance both goals, should be answered affirmatively today. Because of the governmental nature of the State Bar of California, such mandated fees raise no different constitutional concerns than do other taxes. The activities supported by these fees directly serve important state interests. Therefore, Petitioners may not enjoin them.

Petitioners' arguments that the challenged activities are improper fail on two grounds. Each of the challenged activities is appropriate under the government speech doctrine. Even under the union analogy that Petitioners

urge this Court to apply, each of the activities meets the test actually established by the decisions of this Court.

By upholding the decision below, this Court will reaffirm both the importance of the public interest goals served by the State Bar, and the right of the states to organize and improve their legal systems as their circumstances require. The State Bar respectfully requests this Court to enable it to continue to fulfill its role in the governance of the State of California, by affirming the decision of the California Supreme Court.

DATED: December 18, 1989

Respectfully submitted,

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APPENDIX A

California State Government Code

§ 12011.5. Judicial vacancies; state bar evaluation of candidates

(a) In the event of a vacancy in a judicial office to be filled by appointment of the Governor or in the event that a declaration of candidacy is not filed by a judge and the Governor is required under subdivision (d) of Section 16 of Article VI of the Constitution to nominate a candidate, the Governor shall first submit to a designated agency of the State Bar of California the names of all potential appointees or nominees for *the* judicial office for evaluation of their judicial qualifications.

(b) The membership of the designated agency of the State Bar responsible for evaluation of judicial candidates shall consist of attorney members and public members with the ratio of public members to attorney members determined, to the extent practical, by the ratio established in Section 6013, 6013.4, and 6013.5, inclusive, of the Business and Professions Code. It is the intent of this subdivision that the designated agency of the State Bar responsible for evaluation of judicial candidates shall be broadly representative of the ethnic, sexual, and racial diversity of the population of California and composed in accordance with Section 11140 and 11141 of the Government Code. The further intent of this subdivision is to establish a selection process for membership on the designated agency of the State Bar responsible for evaluation of judicial candidates under which no member of *that* agency shall provide inappropriate, multiple representation for purposes of this subdivision.

(c) Upon receipt from the Governor of the names of candidates for judicial office and their completed per-

sonal data questionnaires, the State Bar shall employ appropriate confidential procedures to evaluate and determine the qualifications of each candidate with regard to his or her ability to discharge the judicial duties of the office to which the appointment or nomination shall be made. Within 90 days of submission by the Governor of the name of a potential appointee for judicial office, the State Bar shall report in confidence to the Governor its recommendation whether the candidate is exceptionally well-qualified, well-qualified, qualified, or not qualified and the reasons therefor, and may report, in confidence, such other information as the State Bar deems pertinent to the qualifications of the candidate.

(d) In determining the qualifications of a candidate for judicial office, the State Bar shall consider, among other appropriate factors, his or her industry, judicial temperament, honesty, objectivity, community respect, integrity, health, ability, and legal experience.

(e) The State Bar shall establish and promulgate rules and procedures regarding the investigation of the qualifications of candidates for judicial office by the designated agency. *These* rules and procedures shall establish appropriate, confidential methods for disclosing to the candidate the subject matter of substantial and credible adverse allegations received regarding the candidate's health, physical or mental condition, or moral turpitude which, unless rebutted, would be determinative of the candidate's unsuitability for judicial office. No provision of this section shall be construed as requiring that any rule or procedure be adopted which permits the disclosure to the candidate of information from which the candidate may infer the source, and no information shall either be disclosed to the candidate nor be obtainable by any process which would jeopardize the confidentiality of

communications from persons whose opinion has been sought on the candidate's qualifications.

(f) All communications, written, verbal or otherwise, of and to the Governor, the Governor's authorized agents or employees, including, but not limited to, the Governor's Legal Affairs Secretary and Appointments Secretary, or of and to the State Bar in furtherance of the purposes of this section are absolutely privileged from disclosure and confidential, and any communication made in the discretion of the Governor or the State Bar with a candidate or person providing information in furtherance of the purposes of this section shall not constitute a waiver of *the* privilege or a breach of confidentiality.

(g) When the Governor has appointed a person to a trial court who has been found not qualified by the designated agency, the State Bar may make public this fact after due notice to the appointee of its intention to do so, but no such notice or disclosure shall constitute a waiver of privilege or breach of confidentiality with respect to communications of or to the State Bar concerning the qualifications of the appointee.

(h) When the Governor has nominated or appointed a person to the Supreme Court or court of appeal in accordance with subdivision (d) of Section 16 of Article VI of the State Constitution, the Commission on Judicial Appointments may invite, or the State Bar's governing board or its designated agency may submit to the commission its recommendation, and the reasons therefor, but no such disclosure shall constitute a waiver of privilege or breach of confidentiality with respect to communications of or to the State Bar concerning the qualifications of the nominee or appointee.

(i) No person or entity shall be liable for any injury caused by any act or failure to act, be it negligent, intentional, discretionary, or otherwise, in the furtherance of the purposes of this section, including, but not limited to, providing or receiving any information, making any recommendations, and giving any reasons therefor. As used in this section, the term "State Bar" means its governing board and members thereof, the designated agency of the State Bar and members thereof, and employees and agents of the State Bar.

(j) At any time prior to the receipt of the report from the State Bar specified in subdivision (c) the Governor may withdraw the name of any person submitted to the State Bar for evaluation pursuant to this section.

(k) No candidate for judicial office may be appointed until the State Bar has reported to the Governor pursuant to this section, or until 90 days have elapsed after submission of the candidate's name to the State Bar, whichever occurs earlier. The requirement of this subdivision shall not apply to any vacancy in judicial office occurring within the 90 days preceding the expiration of the Governor's term of office, provided, however, that with respect to *those* vacancies and with respect to nominations pursuant to subdivision (d) of Section 16 of Article VI of the Constitution, the Governor shall be required to submit any candidate's name to the State Bar in order to provide it an opportunity, if time permits, to make an evaluation.

(l) Nothing in this section shall be construed as imposing an additional requirement for an appointment or nomination to judicial office, nor shall anything in this section be construed as adding any additional qualifications for the office of a judge.

(m) The Board of Governors of the State Bar shall not conduct or participate in, or authorize any committee, agency, employee, or commission of the State Bar to conduct or participate in, any evaluation, review, or report on the qualifications, integrity, diligence, or judicial ability of any specific justice of a court provided for in Section 2 or 3 of Article VI of the California Constitution without prior review and statutory authorization by the Legislature, except an evaluation, review, or report on potential judicial appointees or nominees as authorized by this section.

The provisions of this subdivision shall not be construed to prohibit a member of the State Bar from conducting or participating in such an evaluation, review, or report in his or her individual capacity.

(n) If any provision of this section other than a provision relating to or providing for confidentiality or privilege from disclosure of any communication or matter, or the application of any such provision to any person or circumstances, shall be held invalid, the remainder of this section to the extent it can be given effect, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and to this extent the provisions of this section are severable. If any other act of the Legislature conflicts with the provisions of this section, this section shall prevail.

(Amended by Stats.1984, c. 16, § 3.)

§ 6. Judicial Council

Sec. 6. The Judicial Council consists of the Chief Justice and one other judge of the Supreme Court, 3 judges of courts of appeal, 5 judges of superior courts, 3 judges of municipal courts, and 2 judges of justice courts,

each appointed by the Chief Justice for a 2-year term; 4 members of the State Bar appointed by its governing body for 2-year terms; and one member of each house of the Legislature appointed as provided by the house.

Council membership terminates if a member ceases to hold the position that qualified the member for appointment. A vacancy shall be filled by the appointing power for the remainder of the term.

The council may appoint an Administrative Director of the Courts, who serves at its pleasure and performs functions delegated by the council or the Chief Justice, other than adopting rules of court administration, practice and procedure.

To improve the administration of justice the council shall survey judicial business and make recommendations to the courts, make recommendations annually to the Governor and Legislature, adopt rules for court administration, practice and procedure, not inconsistent with statute, and perform other functions prescribed by statute.

The Chief Justice shall seek to expedite judicial business and to equalize the work of judges. The Chief Justice may provide for the assignment of any judge to another court but only with the judge's consent if the court is of lower jurisdiction. A retired judge who consents may be assigned to any court.

Judges shall report to the Judicial Council as the Chief Justice directs concerning the condition of judicial business in their courts. They shall cooperate with the council and hold court as assigned.

(Added Nov. 8, 1966. Amended Nov. 5, 1974.)

§ 8. Commission on judicial performance

Sec. 8. The Commission on Judicial Performance consists of 2 judges of courts of appeal, 2 judges of superior courts, and one judge of a municipal court, each appointed by the Supreme Court; 2 members of the State Bar who have practiced law in this State for 10 years, appointed by its governing body; and 2 citizens who are not judges, retired judges, or members of the State Bar, appointed by the Governor and approved by the Senate, a majority of the membership concurring. All terms are 4 years.

Commission membership terminates if a member ceases to hold the position that qualified the member for appointment. A vacancy shall be filled by the appointing power for the remainder of the term.

(Added Nov. 8, 1966. Amended Nov. 5, 1974; Nov. 2, 1976.)

§ 6026.5. Public meetings; exceptions

Every meeting of the board shall be open to the public except those meetings, or portions thereof, relating to:

(a) Consultation with counsel concerning pending or prospective litigation.

(b) Involuntary enrollment of active members as inactive members due to mental infirmity or illness or addiction to intoxicants or drugs.

(c) The qualifications of judicial appointees, nominees, or candidates.

(d) The appointment, employment or dismissal of an employee, consultant, or officer of the State Bar or to hear complaints or charges brought against such employee,

consultant, or officer unless such person requests a public hearing.

(e) Disciplinary investigations and proceedings, including resignations with disciplinary investigations or proceedings pending, and reinstatement proceedings.

(f) Appeals to the board from decisions of the Board of Legal Specialization refusing to certify or recertify an applicant or suspending or revoking a specialist's certificate.

(g) Appointments to or removals from committees, boards, or other entities.

(h) Joint meetings with agencies provided in Article VI of the California Constitution.

(Added by Stats.1975, c. 874, p. 1953, § 7.5.)

§ 6086.8. Judgments for actions committed in a professional capacity; claims or actions for damages; reports to state bar

(a) Within 20 days after a judgment by a court of this state that a member of the State Bar of California is liable for any damages resulting in a judgment against the attorney in any civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity, the court which rendered the judgment shall report that fact in writing to the State Bar of California.

(b) Every *claim or action for damages against* a member of the State Bar of California *for* fraud, misrepresentation, breach of fiduciary duty, or * * * negligence committed in a professional capacity *shall be reported to the State Bar of California within 30 days of receipt by the* admitted *insurer or licensed surplus brokers providing*

professional liability insurance to that member of the State Bar.

(c) An attorney who does not possess professional liability insurance shall send a complete written report to the State Bar as to any settlement, judgment, or arbitration award described in subdivision (b), in the manner specified in that subdivision.

(Added by Stats.1986, c. 475, § 3. Amended by Stats.1988, c. 1159, § 15.)

§ 20000. Short title

This part may be cited as the Public Employees' Retirement Law.

(Added by Stats.1945, c. 123, p. 573, § 1. Amended by Stats.1967, c. 84, p. 989, § 1; Stats.1967, c. 1631, p. 3899, § 1, operative July 1, 1968.)

§ 20009. Public agency in general

"Public agency" means any city, county, district, other local authority or public body of or within this State.

(Added by Stats.1945, c.123, p. 574, § 1.)

§ 20009.1. Public agency; scope

"Public agency" also includes the following:

(a) The Commandant, Veterans Home of California, with respect to employees of the post exchange and other post fund activities whose compensation is paid from the post fund of the Veterans Home of California.

(b) Any foundation or trust established for the purpose of providing essential activities related to, but not normally included as a part of, the regular instructional

program of the California State University * * * or community college.

(c) Any student body or nonprofit organization composed exclusively of students of the California State University * * * or community college or of members of the faculty of the California State University * * * or community college, or both, and established for the purpose of providing essential activities related to, but not normally included as a part of, the regular instructional program of the California State University * * * or community college.

(d) The Adjutant General with respect to persons employed by him *or her* pursuant to federal regulations and compensated directly from federal funds.

(e) A state organization of governing boards of school districts, the primary purpose of which is the advancing of public education through research and investigation.

(f) Any nonprofit corporation whose membership is confined to public agencies as defined in Section 20009.

(g) A section of the California Interscholastic Federation.

(h) Any credit union incorporated under Division 5 (commencing with Section 14000) of the Financial Code, or incorporated pursuant to federal law, with 95 percent of its membership limited to employees who are members of or retired members of the Public Employees' Retirement System or the State Teachers' Retirement System, and their immediate families, and employees of any such credit union. For the purposes of this subdivision, "immediate family" means those persons related by blood or marriage who reside in the household of a member of the credit union who is a member *of* or retired member of the Public Employees' Retirement System or the State

Teachers' Retirement System. The credit union shall pay any costs that are in addition to the normal charges required to enter into a contract with the board. All such payments made by the credit union which are in addition to the normal charges required shall be added to the total amount appropriated by the Budget Act for the administrative expense of the system. *For purposes of this subdivision, a credit union shall not be deemed to be a public agency unless it has entered into a contract with the board pursuant to Chapter 4 (commencing with Section 20450) of this part prior to january 1, 1988. After January 1, 1988, the board shall not enter into a contract with any credit union as a public agency.*

(i) Any county superintendent of schools which was a contracting agency on July 1, 1983, and any school district or community college district which was a contracting agency with respect to local policemen, as defined in Section 20020.8, on July 1, 1983.

(Amended by Stats.1982, c. 330, p. 1618, § 1.5, eff. June 30, 1982, operative July 1, 1983; Stats.1987, c. 562, § 1.)

Rule 3-320. Relationship With Other Party's Lawyer.

A member shall not represent a client in a matter in which another party's lawyer is a spouse, parent, child, or sibling of the member, lives with the member, is a client of the member, or has an intimate personal relationship with the member, unless the member informs the client in writing of the relationship.

Discussion:

Rule 3-320 is not intended to apply to circumstances in which a member fails to advise the client of a relationship with another member who is merely a partner or associate in the same law firm as the adverse party's counsel, and who has no direct involvement in the matter.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On December 18, 1989, I served the within Respondents' Brief on the Merits in re: Eddie Keller v. State Bar of California in the United States Supreme Court October Term 1988 No. 88-1905, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Ronald A. Zumbrun
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All parties required to be served have been served.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on December 18, 1989, at Los Angeles, California

Ce Ce Medina

CE CE MEDINA